

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

Petition of Cargo Airline Association)
For Expedited Declaratory Ruling Regarding)
Non-Telemarketing Package Notifications)

CG Docket No. CG 02-278

GROUPME, INC.'S COMMENTS

GroupMe, Inc. (“GroupMe”), by its undersigned counsel, submits these comments in support of the Cargo Airline Association’s (“CAA”) Petition for Expedited Declaratory Ruling (“Petition”) pursuant to the Public Notice released October 16, 2012, by the Federal Communication Commission (“Commission” or “FCC”) in the above-referenced proceeding.¹ The CAA Petition seeks clarification that, under limited circumstances, prior written express consent to receive autodialed and prerecorded non-telemarketing calls and messages, including text messages, can be obtained and provided by an intermediary or associated third party in conformity with the Telephone Consumer Protection Act (“TCPA”).² GroupMe seeks similar clarification in its Petition filed with the Commission and requests that the Commission clarify that consent obtained and provided by an intermediary can be relied upon in connection with GroupMe’s non-commercial, social media tool, as well as in the context of package delivery services. The record developed in response to GroupMe’s Petition demonstrates that many parties support clarifying that consent obtained and provided by an intermediary is appropriate for certain kinds of non-

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from the Cargo Airlines Association*, DA 12-1652 (rel. Oct. 16, 2012).

² CAA Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 1 (filed Aug. 17, 2012) (“CAA Petition”).

commercial, informational or administrative communications that recipients expect to receive.³ GroupMe supports clarifying the TCPA so as to allow for continued development of innovative communications tools and services as well as to ensure that the TCPA does not needlessly impede non-commercial communications that consumers' desire. Providing the clarification requested by CAA and GroupMe will continue to protect consumers because such clarification concerns only non-commercial, informational or administrative communications which neither Congress nor the Commission intended to prohibit.

The need for Commission action to clarify what constitutes prior express consent under both the TCPA and the Commission's rules is manifested by ever-increasing TCPA-based litigation. As numerous parties in this docket detail, the quantity of lawsuits filed alleging violation of the TCPA are proliferating at an alarming rate and courts have applied the TCPA inconsistently due to, in part, the lack of Commission clarification on the appropriate scope of the law. Without needed clarification from the Commission concerning the proper interpretation of the TCPA with respect to consent obtained and provided by an intermediary and the definition of what constitutes an ATDS, the TCPA will continue to be abused by plaintiffs' lawyers to the detriment of the public interest.⁴

³ See *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) ("GroupMe Petition"). Note that the GroupMe Petition also seeks clarification with respect to the definition of an automatic telephone dialing system ("ATDS") under the TCPA. But since the CAA Petition is limited to the issue of consent through an intermediary, GroupMe limits its comments to this issue. See CAA Comments, CG Docket No. 02-278, at 1-3 (filed Aug. 30, 2012) ("CAA Comments"); Twilio, Inc. Comments, CG Docket No. 02-278, at 15-16 (filed Aug. 30, 2012) ("Twilio Comments"); U.S. Chamber of Commerce Comments, CG Docket No. 02-278, at 11-13 (filed Aug. 30, 2012) ("U.S. Chamber Comments"); Nicor Energy Services Company Reply Comments, CG Docket No. 02-278, at 6-10 (filed Sept. 10, 2012) ("Nicor Replies").

⁴ See, e.g., *Global Tel*Link Corporation Petition for Expedited Clarification and Declaratory Ruling*, at 7-8 (filed March 4, 2010) (citing to numerous TCPA-related lawsuits); *SoundBite Communications Petition for Expedited Declaratory Ruling*, at 2, n.4 (filed Feb. 16, 2012) (cont'd)

I. THE COMMISSION SHOULD CLARIFY THAT CONSENT OBTAINED THROUGH AN INTERMEDIARY SATISFIES THE TCPA AND THE COMMISSIONS RULES FOR NON-COMMERCIAL, INFORMATIONAL OR ADMINISTRATIVE MESSAGES

As explained in detail in a number of filings made by GroupMe,⁵ GroupMe offers a free group text messaging service enabling user-initiated, real-time, non-commercial group communications among user-created groups. When initially establishing a GroupMe group, the group creator triggers a limited number of text messages sent by GroupMe to the group members. All of these text messages are non-commercial, informational or administrative communications informing the recipient how to use the GroupMe social media tool including opt-out instructions. GroupMe also makes available a free application so that users who either do not have a mobile device or wish to avoid text messaging charges can still participate in user-created GroupMe groups. GroupMe's Terms of Service prohibit using the service for commercial purposes and the company has not received any complaints of users abusing the service to send commercial text messages.⁶

(referencing many lawsuits filed against the company for confirmatory opt-out text messages); GroupMe Petition, at 2, n.4, & 3, n.5 (noting two separate TCPA lawsuits); Twilio Comments, at 5, n.14, n.15 (providing numerous case citations); U.S. Chamber Comments, at 4 (explaining that from 2008 to 2011 federal lawsuits under the TCPA have increased by more than 500% and the number of federal class-action TCPA lawsuits has increased 10-fold).

⁵ See *GroupMe Petition*, at 4-8 (describing the service in detail); Ex Parte Letter from Ronald W. Del Sesto, Jr., Counsel for GroupMe, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at Att. 1 (filed March 13, 2012) (illustrating how the service is used) ("*March 13 Ex Parte*"); Ex Parte Letter from Ronald W. Del Sesto, Jr., Counsel for GroupMe, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed July 18, 2012) (detailing non-commercial nature of the offering and how it is used by a variety of groups) ("*July 18 Ex Parte*"); GroupMe Comments, CG Docket No. 02-278, at 5-7 (filed Aug. 30, 2012) (providing additional details of GroupMe's service offering); GroupMe Reply Comments, CG Docket No. 02-278, at 4-11 (correcting the record with respect to maximum group size and responding to numerous mischaracterizations of the service) ("*GroupMe Replies*").

⁶ See Ex Parte Letter from Ronald W. Del Sesto, Jr., Counsel for GroupMe, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed July 20, 2012) (providing a copy of the (cont'd))

As detailed in the CAA Petition, package delivery notifications are communications that consumers wish to receive where, for example, one party (a seller) may obtain and provide the consent to receive such messages on behalf of another party (a purchaser) from a third party (a shipper).⁷ Package delivery notifications are a small subset of non-commercial, informational or administrative messages that the TCPA and the Commission's rules were never intended to prohibit. The Commission recognized that there are numerous communications where "requiring prior written express consent . . . would unnecessarily restrict consumer access to information communicated through purely informational calls."⁸ Pointing to messages concerning bank account balance, credit fraud alerts, package delivery and school closing information as non-commercial, informational or administrative communications that consumers wish to receive even in the absence of "direct" prior written express consent from the receiver of the message, the Commission rightly found that requiring such direct consent in every instance would not promote the public interest.⁹ "Indirect" consent obtained and provided by a third party on behalf of the message receiver is a permissible alternative in such situations, and message senders should be allowed to rely on such consent obtained and communicated by third parties on behalf of the receiver of the message.

The record developed in connection with the GroupMe Petition demonstrates an even greater range of non-commercial, informational or administrative communications that the

Terms of Service that prohibit commercial use of the service) ("*July 20 Ex Parte*"); GroupMe Replies, at 5-6.

⁷ See CAA Petition, at 2-3 (providing detail of numerous instances where consent through an intermediary is desired by package recipients); CAA Comments, at 2 (noting that obtaining prior written express consent from the recipient of a package is often not possible).

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830, 1838 ¶ 21 (2012).

⁹ See *id.*

Commission should likewise not “unnecessarily impede.”¹⁰ Specifically, commenting parties pointed to communications related to confirmatory messages regarding electronic fund transfers, electronic gift certificates or e-cards,¹¹ payment and suspicious activity alerts, disaster-related communications,¹² appointment reminders or scheduling changes with respect to home appliance repair, and utility account-related activity,¹³ as examples of such messages. Further, many health care providers use text messages today to remind patients of appointments or to notify recipients of scheduling changes. In all of these instances, the use of consent through an intermediary should be clearly permitted. Whether consent is “direct” or “indirect” is irrelevant to determining the utility of the information communicated to the recipient, and the absence of direct consent is not informative as to the recipient’s desire to receive such communications. Many times spouses, partners, significant others, family members, caregivers or friends are well positioned to stand in as an intermediary for the recipient and represent that the recipient has given consent to receive non-commercial, informational or administrative messages on a wireless device. Message senders should be permitted to rely on these representations. Clarifying that consent obtained through an intermediary is consistent with the TCPA and the Commission’s rules, and in particular when such communications are non-commercial, informational or administrative in nature promotes consumer welfare especially when such communications are not prone to abuse as there is no monetary incentive for the originators to send these messages.¹⁴

¹⁰ *Id.*

¹¹ *See, e.g.,* U.S. Chamber Comments, at 13.

¹² *See, e.g.,* American Bankers Association and Consumer Bankers Association Reply Comments, CG Docket No. 02-278, at 4 (filed Sept. 10, 2012) (“ABA Reply Comments”)

¹³ *See, e.g.,* Nicor Replies, at 7.

¹⁴ *See, e.g.,* U.S. Chamber Comments, at 12. Also, per text message charges are less common as the two largest U.S. wireless carriers are moving to bundled packages that include unlimited text messages. *See* GroupMe Replies, at 24, 24 n.90.

II. NEITHER CONGRESS NOR THE COMMISSION INTENDED TO PROHIBIT NON-COMMERCIAL, INFORMATIONAL OR ADMINISTRATIVE TEXT MESSAGES UNDER THE TCPA

Divining legislative intent as to what communications were meant to be regulated is difficult given that Congress passed the TCPA in 1991 and it was not until 2003 that the Commission interpreted the TCPA as applicable to text messages.¹⁵ But review of the TCPA's legislative history and other provisions of the TCPA make clear that Congress was concerned about generic, one-way, commercial speech that was sent *en masse* to consumers by merchants that usually had no relationship with the recipient of such communications.¹⁶ Conversely, the legislative record also demonstrates that non-commercial communications constituted information that recipients wanted to receive therefore eliminating the primary and most important justification for the TCPA.¹⁷ Indeed, it would be highly unusual for a statute that regulates commercial speech to prohibit non-commercial speech.

Based on these legislative findings and the Commission's rules implementing the TCPA, it is apparent that neither Congress nor the Commission meant to prohibit the offering of innovative, non-commercial, informational, social media tools, like GroupMe's application. Nonetheless, courts have continued to struggle with the Commission's prior interpretations of the TCPA,

¹⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 (2003) ("2003 TCPA Order").

¹⁶ See, e.g., GroupMe Petition, at 13-14 (noting that Congress passed the TCPA to regulate commercial, mass produced speech); GroupMe Comments, at 9-10, 10 n.24, n.25 (highlighting that the Congressional record demonstrates that consumer expectations are different with respect to non-commercial speech and such communications are less intrusive); Twilio, Comments, at 2-3 (emphasizing that the Congressional records shows that the TCPA was meant to regulate intrusive and unwanted telephone solicitations); Nicor Replies, at 3, 3 n.2 (filed Nov. 1, 2012).

¹⁷ H.R. Rep. No. 102-317, at 16 (1991) ("In addition to the relatively low volume of non-commercial calls, the Committee also reached the conclusion, based on the evidence that such calls are less intrusive to consumers because they are more expected."). See also GroupMe Comments, at 10, 10 n.24, n.25 (citing to the Congressional record for support that the TCPA was not meant to apply to non-commercial communications and case law recognizing same).

and need clarity so as to ensure that the public interest is not harmed through baseless litigation aimed at providers of non-commercial communications that people actually want to receive.

For example and as explained in previous filings, GroupMe enables group creators to initiate non-commercial group discourse among a limited number of people.¹⁸ While the maximum group size is fifty, the average GroupMe group is approximately five.¹⁹ The service has a wide diversity of users including groups limited to family members, friends that share a common interest, event-driven groups (like those attending a performance or other event), and has emerged as an important tool for emergency personnel.²⁰ The hallmark of speech enabled by GroupMe's tool is group, customized discourse of an intensely personal nature that would only be of interest to the few members that comprise the group. Group creators determine who would be interested in such non-commercial, informational speech and the group members have the ability to opt-out should they choose not to participate. The requirements of the TCPA were simply never intended to apply to non-commercial communications such as these.

Additionally, the Commission has previously recognized that its telemarketing and do-not-call rules are inapplicable when a marketer has a "personal relationship" with the called party.²¹ As previously detailed by GroupMe, the Commission's rules allow for an exception to "do-not-call" rules when the party placing a *commercial* call has a "personal relationship" to the

¹⁸ See GroupMe Petition, at 6-7. GroupMe's Terms of Service prohibit commercial use of the service and the company has not received any user complaints that the service is being used for commercial purposes. See *July 20 Ex Parte* (providing a copy of the Terms of Service that prohibit commercial use of the service); GroupMe Replies, at 5-6.

¹⁹ See GroupMe Replies, at 4-6.

²⁰ See GroupMe Petition, at 4-5; *March 13 Ex Parte*, at Att. 1 (illustrating how the service is used); *July 18 Ex Parte* (detailing the non-commercial nature of the offering and how it is used by a variety of groups).

²¹ *2003 TCPA Order*, 18 FCC Rcd at 14045. See also 47 C.F.R. § 64.1200(c)(2)(iii).

called party.²² Even if the called party is registered on the “do-not-call” list, the Commission’s rules allow for a commercial call provided that the party placing the call has a “personal relationship” with the called party.²³ Surely allowing an intermediary to obtain and provide consent on behalf of GroupMe group message recipients to receive non-commercial, informational or administrative text messages, and where the group creator has a “personal relationship” with the group members, is also consistent with the TCPA and the Commission’s rules. The same reasoning applies to the request made in the CAA Petition.

Finally, for important First Amendment considerations, the Commission must clarify that relying on consent obtained and provided by an intermediary is appropriate for a social media tool that is limited to non-commercial, informational or administrative text messages. GroupMe previously detailed how prohibiting all non-commercial, informational and administrative text messages runs afoul of the First Amendment.²⁴ Courts that have considered First Amendment challenges to the TCPA’s ATDS provision have reviewed the statute exclusively in the context of commercial speech.²⁵ GroupMe’s positions on these issues have been previously presented to the Commission, and as such it will not repeat those arguments here.²⁶ However, GroupMe reaffirms that the Commission must address this constitutional infirmity by allowing for consent

²² See GroupMe Replies, at 19-20. A “personal relationship” refers to “an individual personally known to the telemarketer making the call.” *2003 TCPA Order*, 18 FCC Rcd at 14045. See also 47 C.F.R. § 64.1200(f)(15) (“The term *personal relationship* means any family member, friend or acquaintance of the telemarketer making the call.”).

²³ See *2003 TCPA Order*, at 14045-46. “In such cases, we believe that calls to family members, friends and acquaintances of the caller will be both expected by the recipient and limited in number. Therefore, the two most common sources of consumer frustration associated with telephone solicitations- high volume and unexpected solicitations- are not likely present when such calls are limited to persons with whom the marketer has a personal relationship.” *Id.* at 14045.

²⁴ See GroupMe Comments, at 8-14.

²⁵ See *id.* at 11.

²⁶ See GroupMe Comments, at 8-14.

through an intermediary for non-commercial, informational or administrative speech as proposed in both the GroupMe Petition and the CAA Petition.

III. CONCLUSION

For the reasons set forth herein, GroupMe supports CAA Petition and respectfully recommends that the Commission clarify that wireless subscribers may consent to receive non-commercial, administrative, or informational calls or text messages obtained through an intermediary as detailed in the GroupMe Petition and the CAA Petition.

Respectfully submitted,

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